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March 9, 2001

VIA HAND DELIVERY
Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, D.C. 20554

Re: WT Docket No. 98-169; RM-8951

Dear Ms. Salas:

On behalf of the Ad Hoc Coalition, thereby are hereby filed an original and four (4) copies of a Petition For Reconsideration in the referenced proceeding. This filing supersedes the Petition For Reconsideration filed by our firm on behalf of the Ad Hoc Coalition in the same proceeding on January 12, 2001.

Please direct any questions regarding this matter to the undersigned.

Sincerely yours,

Richard S. Myers

Enclosures

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
CELTRONIX TELEMETRY, INC. ET AL	)	WT Docket No. 98-169
	)	RM-8951
Application of Bidding Credits	)	
in the Interactive Video	)	
and Data Services Auction	)	

To: The Commission

PETITION FOR RECONSIDERATION

Submitted By

THE AD HOC COALITION:
CELTRONIX TELEMETRY, INC.
TV-ACTIVE, L.L.C.
TEXAS INTERACTIVE NETWORK, INC.
HISPANIC & ASSOCIATES
ZARG CORPORATION
IVDS INTERACTIVE ACQUISITION PARTNERS
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SUMMARY

The Ad Hoc IVDS Coalition ("Coalition") seeks reconsideration of the Commission's Second 218-219 MHz Reconsideration Order released on December 13, 2000. The Coalition's previous petition for reconsideration in this proceeding demonstrated that the 25% remedial bidding credit ("RBC") adopted by the Commission to remedy the race/gender discrimination that occurred in spectrum auctions was inadequate and was unlawfully limited to small businesses. Another petitioner, Kingdon Hughes, agreed.

This petition demonstrates that the Commission is mischaracterizing its own actions to legitimize an unlawful outcome. The RBC, when it was adopted in 1999, was clearly part of the remedy for the race and gender discrimination that occurred in the 1994 auction. However, in its December 13, 2000 Order, the Commission now states that the RBC is not part of that remedy. This mischaracterization is motivated, inappropriately, by the Commission's desire to avoid making refunds to large businesses. The RBC is a credit limited to small businesses. By mischaracterizing it only as a small business credit and not part of the remedy for discrimination, the Commission believes it can exclude large businesses from that remedy.

The outcome reached by the Commission's mischaracterizations is unlawful. There is no record evidence that licensees crafted business plans relying upon the race/gender credit. The manner in which the Commission adopted the RBC violated the Administrative Procedure Act (APA). The RBC is a rule which was not included in the Commission's 218-218 MHz notice of proposed rule making that led to its adoption. The Coalition was denied the opportunity of having other interested parties comment on alternative remedies, including the payment of interest. There is no record to support adopting the credit for, or otherwise limiting it to, small businesses. Moreover, affording small business a credit after the auction has taken place cannot further the statutory mandate described by the Commission. The Commission's decision to limit the RBC to small businesses lacks a rational basis.

Further, the remedy adopted by the Commission is not "neutral" and it is flawed under Hunt v. Cromartie. The Commission's own statements clearly indicate its intent to fashion a remedy that retains the original race/gender preference. The RBC is based on a race/gender classification because the benefit of having to pay less in the 1994 auction is given retroactively only to the originally preferred class. The RBC does not operate in a neutral manner because this preferred class received the benefit of the RBC over 6 years before the non-preferred class received it. The RBC subjects the non-preferred class to unequal treatment on the basis of race and gender because that class, unlike the preferred class, has not had use of the funds represented by the RBC for over 6 years.

Despite Commission assertions to the contrary, the RBC fails even rational basis review. A credit provided six years after an auction simply cannot have an effect on the outcome of that auction. Although the Commission claims that the RBC will help small businesses with their licenses, the Commission has made the RBC available to all small business winning bidders at the auction, regardless of whether or not such bidders still retain their licenses.

The Commission had three options available to it in light of the decision in the Adarand case: (1) it could retain the bidding credit and attempt to justify it under Adarand; (2) it could provide all parties suffering the discrimination with a 25% credit; or (3) it could eliminate the bidding credit. It decided that alternative 1 was not feasible. Due to concerns about the impact alternative 3 would have on minority- and women-owned bidders, the Commission did not chose that alternative. That only left the Commission with Alternative 2, which it adopted. However, concerned about the possibility of having to pay tens of millions of dollars in refunds to non-small business in the narrowband PCS service, the Commission has been trying to limit its remedy to small businesses in the 218-219 MHz Service.

Further evidence of the irrationality of the remedy adopted by the Commission is that non-minority- and women-owned small business bidders are not placed by adoption of the remedy in the same position as minority- and women-owned bidders. The latter group received its remedy in 1994, while the former group had to wait over 6 additional years (and is still waiting).

Finally, contrary to the Commission's claim, the argument advanced by Kingdon Hughes that price inflation caused by the use of the unconstitutional bidding credit is not "wholly speculative." A quick review of the record generated by the auction reveals examples of non- minority- and women-owned bidders bidding almost as much as the minority- and women-owned bidders gross bids (before application of their unconstitutional bidding credit). Further, the Commission concedes that the minority- and women-owned bidders crafted business plans in reliance on the unconstitutional credit and thus were prepared to bid up the gross prices of the licenses. Non- minority- and women-owned bidders were required to bid $1.33 for every $1.00 bid by minority- and women-owned bidders.

Before the
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To: The Commission

PETITION FOR RECONSIDERATION

The coalition of Celtronix Telemetry, Inc., TV-Active, L.L.C., Texas Interactive Network, Inc., Hispanic & Associates, Zarg Corporation, IVDS Interactive Acquisition Partners, United Interactive Partners, Inc., and G. Ray Hale [collectively, the "Coalition"], by its attorneys and pursuant to Section 1.106(b)(2), 47 C.F.R. '1.106(b)(2), hereby petitions the Commission to reconsider its Second Order On Reconsideration Of The Report And Order And Memorandum Opinion And Order,FCC 00-411, WT Docket No. 98-169, released December 13, 2000 [hereinafter, "Second Recon. Order"] which, in part, denied the Coalition's petition for reconsideration ("First Petition") of the Commission's Report And Order and Memorandum Opinion And Order, FCC 99-239, WT Docket No. 98-169, RM-9851, 15 FCC Rcd. 1497 (1999)("218-219 MHz Order"), on recon, Order, 14 FCC Rcd 21078(1999).

I. BACKGROUND

In the First Petition, the Coalition challenged the Commission's decision dismissing "as moot" the Coalition's Application For Review ("Application") filed on June 29, 1998 of the decision issued by the Wireless Telecommunications Bureau ("WTB") denying the Coalition's December 5,

1995 request for relief from the 25% race/gender bidding credit used in the 1994 auction, basing its decision on the so-called "doctrine of waiver."[1] The Coalition's First Petition showed that its Application was not moot, because the "conversion" of the race/gender credit to a remedial bidding credit ("RBC") adopted in the 218-219 MHz Order was inadequate and unlawfully limited to small businesses.

In particular, the Coalition cited the example of a female licensee that would continue to receive the benefit of the original race/gender credit even though the female did not qualify as a non-small business at the time of the 1994 auction. The Coalition argued that the RBC was not race/gender neutral but was designed to continue to benefit a preferred class of licensees owned by minorities and females, and that the RBC must be extended to all winning bidders regardless of size.

Another IVDS licensee, Kingdon Hughes, agreed. Hughes also petitioned the Commission to reconsider, among other things, the limitation of the RBC to small businesses, arguing that the unconstitutional race/gender credit inflated prices at the auction, and that to not extend a 25% credit to all winning bidders regardless of size would continue to discriminate against those who paid for their licenses in full. Hughes concluded that there is simply no basis in the record for the Commission to parse its remedies based on the size of a licensee or whether a licensee paid in full for its licenses. The Commission's Second Recon. Order denied the Coalition's and Hughes' requests to extend the RBC to all winning bidders regardless of their size.[2]

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[1] *See* In Re Community Teleplay, Inc., et al. Petition For Relief of Application of Bidding Credits in the Interactive Video and Data Service, Order, DA 98-1008, (rel. May 28, 1998). Community Teleplay, Inc. subsequently changed its name to Celtronix Telemetry, Inc.

[2] 'Standing' is not a requirement to participate in an agency rule making proceeding. In any event, parties who are license purchasers in Commission auctions and regulated by this agency have an interest in its respect, for all licensees, of the right to equal protection under the laws guaranteed

II The Commission Mischaracterizes Its Own Actions To Legitimize An Unlawful Outcome

In an attempt to legitimize the unlawful outcome of denying the RBC to non-small businesses – businesses that were in the same 1994 auction as small businesses where the unconstitutional 25% race/gender credit was used, the Commission mischaracterizes its own actions in this proceeding. In the 218-219 MHz Order released in September, 1999, the Commission clearly adopted a two-step remedy for dealing with the Court of Appeals remand requiring it to address the constitutional issues of the race/gender credit. The Commission, specifically in response to the constitutional issues the Court's remand required it to address, stated:

> We will eliminate from our rules the minority- and women-owned business bidding credits and will simultaneously grant credits of commensurate size to all winning small business bidders in the first IVDS auction.[3]

The Commission further stated that it believed

> the conversion of race- and gender-based bidding credits to small business bidding credits resolves the issues presented by Graceba. Regardless of race or gender, all small business winning bidders were eligible to pay for their licenses in installment payments in what is now the 218-219 MHz Service, so there is no need to invoke the

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by the U.S. Constitution. The Coalition's actions in this proceeding include those of a private attorney general seeking the enforcement of our nation's Constitution. The concept of private attorney generals is well established. See, e.g., United Church of Christ v. FCC (D.C. Cir. 1966)(consumers as private attorney generals to challenge unlawful discrimination). Further, as demonstrated herein, the RBC and the manner in which it was adopted injure the Coalition, and the agency is hindering the ability of other parties to protect their interests. The Coalition licensees share a unique, close relation with other 1993-1995 auction licensees with whom they may form telecommunication networks regulated by the same Commission that has subjected all of them to the same race and gender discrimination. The Coalition therefore also possesses third party standing to challenge the Commission's actions. Powers v. Ohio, 499 U.S. 400 (1991).

[3] 218-219 MHz Order, para. 60.

> strict scrutiny standard of Adarand. Thus we believe it is appropriate to extend the further benefit of a bidding credit based solely on size. These remedies are consistent with the approach to bidding credits taken in other post-Adarand auctions.[4]

The Commission went on to describe "this remedy," i.e., the two-step remedy that included the RBC, as striking a "proper balance" among the factors it considered.[5]

In the Second Recon. Order, in response to the Coalition's First Petition and the Hughes Petition, the Commission mischaracterizes this two-step remedy adopted in the 218-219 MHz Order. The Commission makes the remarkable statement:

> The arguments of Hughes and [the Coalition] are based upon the assumption that we accorded bidding credits to all small business as a direct remedy for race and gender discrimination. That is incorrect. In order address the questions raised concerning the constitutionality of race- and gender-based bidding credits, we eliminated those credits. That was the extent of the "remedy" provided for Graceba's concerns.[6]

Importantly, the Commission did not cite the 218-219 MHz Order where it clearly stated that the RBC – which, after all, stands for *Remedial* Bidding Credit – was part of the remedy for the race and gender discrimination that occurred in the 1994 auction.

The Commission's mischaracterizations of its own remedy are inappropriately motivated to deny the RBC to non-small businesses. Specifically, by limiting the "remedy" to one-step, i.e., the elimination of the race/gender credit, it can include non-small businesses within that remedy, while *excluding* them from the RBC, which now suddenly is *not* part of that remedy. The Commission's

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[4] Id., para. 62.

[5] Id., para. 63.

[6] Second Recon. Order, para. 44.

approach strains credulity. It is a transparent attempt to avoid making refunds to large businesses that participated in the first three Commission auctions in 1993-1995 where race/gender discrimination occurred, including the nationwide and regional Narrowband Personal Communications Service ("NPCS") auctions.

The outcome the Commission has reached is unlawful. The Commission found that it would be "disruptive and unfair" not to provide some bidding credit after eliminating the race/gender credit "as licensees had crafted business plans in reliance upon the credit."[7] The Commission, however, cited no evidence that any licensee had done so. Moreover, such reliance interest is not entitled to constitutional protection especially where the "remedy" adopted by the Commission works to exclude parties – in this case large businesses – that suffered race and gender discrimination in the 1993-1995 auctions.

The manner in which the Commission adopted the RBC violated the provisions of Section 553 of the Administrative Procedure Act ("APA"). Those provisions require the Commission: (1) to include in its notices of proposed rule making published in the Federal Register either the terms of substance of proposed rules, or a description of the issues involved;[8] and (2) to give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.[9]

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[7] Second 218-219 MHz Order, para. 44.

[8] 5 U.S.C. §553(b)(3).

[9] 5 U.S.C. §553(c).

The Commission adopted Section 95.816(g), a rule which grants an RBC limited to small businesses.[10] However, the Commission's Notice of Proposed Rulemaking released on September 17, 1998 did not include the terms of substance of this rule, nor a description of the constitutional issues involving race and gender discrimination that were remanded to it by the Court of Appeals.[11] The manner in which the Commission adopted the RBC therefore violated Section 553 of the APA.

The Commission's action is also inconsistent with National Association of Broadcasters v. Federal Communications Commission, 554 F.2d 1118 (D.C. Cir. 1976). In National, following a Supreme Court remand that invalidated a Commission fee schedule, the Commission decided sua sponte to reconsider a new fee schedule it had adopted. It did so by issuing a notice of proposed rule making that proposed revisions to the fees, specifically acknowledging that it was doing so in response to the remand. 554 F.2d 1118 at n. 19. Directly contrary to this precedent, the Commission adopted the RBC rule following the Court of Appeals remand without a notice of proposed rule making that complied with the APA.

The Coalition and other licensees of the 1993-1995 auctions were injured by the Commission's failure to act lawfully in a manner consistent with the APA and the National case. The Coalition was denied the opportunity to have other interested parties submit written data, views, and arguments with respect to the race and gender discrimination that occurred in these auctions and alternative remedies, including payment of interest. All licensees of the 1993-1995 auctions that were in the non-preferred class of bidders injured by the race and gender discrimination were denied the opportunity of advance notice of the adoption of a rule that excluded some of them, i.e., non-

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[10] See 218-219 MHz Order, Appendix B.

[11] 13 FCC Rcd 19064 (1998).

small businesses, from receiving any remedy for that discrimination. In particular, the Commission's violation of the APA and failure to follow the National precedent denied large businesses, including NPCS licensees, the opportunity to take notice and submit comments on a remedy limited to small businesses, thus hindering their ability to protect their interests.[12]

The Commission's rule that limits the RBC to small businesses is unlawful. A record has never been established to support the adoption of such a credit or otherwise limit it to small businesses. The Commission's stated reason for the limitation is to further Congress' objective of disseminating licenses among a wide variety of applicants.[13] That reason lacks a rational basis. The RBC here is being applied retroactively to a past auction.[14] It is simply impossible for an RBC adopted in 1999 to encourage small businesses to participate in an auction that occurred in 1994, and thus cannot serve the statutory mandate described in detail in the Commission's Second Recon. Order.[15]

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[12] See footnote 2, supra. The Commission is further hindering the ability of WebLink Wireless, Inc. ('WebLink'), a large NPCS licensee, to protect its interests by ruling on its RBC request (filed June 8, 2000)without releasing a decision that it can appeal. Pages 19-20 of the final brief submitted by the Commission (filed August 11, 2000) in the Graceba case before the D.C. Circuit (Case No. 99-1437) shows that the agency has already ruled against WebLink's request: "[l]arge businesses are not one of the categories Congress has directed the FCC to protect, and not extending the bidding credits to them causes them no genuine harm. It was thus appropriate not to extend bidding credits to them (even if they had asked)." Over seven months after WebLink filed its RBC request, the agency has yet to release its decision denying that request, hindering WebLink's ability to protect its interests through appeal while the agency attempts to obtain favorable appellate rulings in the Coalition's case it can cite in denying WebLink's request.

[13] Second Recon. Order, para. 47.

[14] Id.

[15] Id., para. 40.

III. The Remedy Adopted By The Commission Is Not 'Neutral'

The RBC adopted by the Commission does not operate in a neutral manner and subjects licensees to unequal treatment on the basis of race or gender. First, the Commission's own statements demonstrate that the RBC was motivated by the unlawful purpose of fashioning a remedy that retains the original race/gender preference.

When it first adopted the RBC, the Commission stated, "We note that there is no negative impact on minority- and women-owned bidders because all such bidders also met the small business qualifications and therefore are not disadvantaged by our action."[16] The Commission has further stated that its "after the fact bidding credit" was specifically intended to minimize "the potential for disruption" to the preferred licensees who received the race/gender credit and "crafted business plans in reliance upon the credit," though evidence of such plans appears nowhere in the record.[17] The Commission's RBC is clearly motivated by an intent to protect the benefit the race/gender credit originally provided to the unconstitutionally preferred class of licensees. Judge Silberman of the D.C. Circuit Court of Appeals observed that this motivation was precisely the sort of motivation underlying facially neutral government action that the Supreme Court's equal protection jurisprudence has refused to countenance.[18]

The RBC limited to small businesses is unexplainable on other grounds. As shown above, encouraging small businesses in 1999 to participate in an auction held in 1994 is irrational and cannot

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[16] 218-219 MHz Order at para. 61.

[17] Second Recon. Order at para. 44.

[18] See First Petition, Attachment A, Judge Silberman's statement, citing Hunt v. Cromartie, 119 S. Ct. 1545, 1549 (1999)(hereinafter 'Hunt').

explain the Commission's action. What it does explain is an intent to protect the original recipients of the race/gender credit while avoiding refunds to large businesses, including NPCS licensees, who also won licenses in the 1993-1995 auctions where the race and gender discrimination occurred. The Commission has never disputed that a facially neutral remedy for this discrimination would extend a RBC to all licensees in the non-preferred class, regardless of their size.

The First Petition cited an example of a woman licensee whose 1994 short form application did not qualify her as a small business at the time she participated in the 1994 auction. She therefore is ineligible for a RBC limited to small businesses. Yet, she retains the 25% race/gender credit, perpetuating the unlawful discrimination against the non-preferred class of licensees. The Commission's Second Recon. Order was silent on this point.

The retroactively applied RBC is not facially neutral even among the limited class of small businesses who are eligible for it. The original preferred class of licensees that received the race/gender credit in the 1994 auction (a credit the Commission retroactively converts to a "small business" RBC) received that credit and the benefits thereof over 6 years before the non-preferred class of winning licensees in the same auction. The non-preferred class, unlike the preferred class, has not had the use of the money represented by the RBC for over 6 years. As adopted, the RBC continues to discriminate against licensees in the non-preferred class because the benefit they receive from the RBC is unequal to benefit received by the original preferred licensees based on race and gender. The Commission's RBC therefore is constitutionally flawed under Hunt.[19]

[19] As was the case with the 218-219 MHz Order, the Commission's Second Recon. Order did not dispute the Coalition's due process analysis that supports its Constitutional takings argument.

IV. The Remedial Bidding Credit Fails Even Under Rational Basis Review

The Commission contends that its adoption of the RBC should be evaluated under rational basis review.[20] It then proceeds to set out the test for rational basis review:

> under rational basis review, government action is permissible unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes the government's actions are deemed irrational. In areas of social and economic policy, a classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.[21]

Even assuming that the Commission is correct and its action should be judged in light of this standard, its action still must be reversed. No matter how many times the Commission tries to wish that it were so, the RBC does not meet the standard of rational basis review. The Commission tries to justify the RBC by arguing that it "furthers Congress' intent of disseminating licenses among a wide variety of applicants."[22] This argument flies in the face of reality. For better or for worse, the licenses have already been disseminated. The licenses eligible for the RBC were won at auction in 1994 and granted to licensees in early 1995. The Commission did not adopt the RBC until September, 1999.[23] Thus, it is abundantly clear that the adoption of the RBC will have absolutely no effect on the dissemination of licenses in the 218-219 Service.

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[20] Second Recon. Order At ¶45.

[21] Citing Sullivan v. Stroop, 496 U.S. 478, 485 (1990); Bowen v. Gilliard, 483 U.S. 587, 600-603, (1987); United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 174-179 (1980); Dandridge v. Williams, 397 U.S. 471, 484-485 (1970).

[22] Second Recon. Order at ¶47.

[23] Further, without explanation, the Commission to date has not refunded the monies due pursuant to the RBC.

Even if the Commission tries to argue that the RBC will somehow cause 218-219 Service licenses to be held among a wide variety of licensees by encouraging licensees to hold onto their licenses, rather than return them to the Commission, nothing in the record supports that assertion. Further, contrary to this argument, the RBC is available to all winning small business bidders at the auction, regardless of whether or not that bidder still retains its license. At best, such an assertion would be purely speculative.

The foregoing analysis makes clear the distinction between the actions taken by the Commission in the 218-219 Service and the decision in the Omnipoint case cited by the Commission in the Second Recon. Order.[24] Omnipoint involved the conversion of a race/gender bidding credit to a small business bidding credit prior to the Block C PCS auction. Clearly the timing of the conversion is crucial. Adoption of the small business credit before the auction made it easier for a small business to compete for licenses in the auction, thereby increasing the likelihood that the small business would be successful at the auction. The connection between this action and the advancement of Congress' intent to help small businesses obtain Commission licenses is clear. Since the RBC was adopted *5* years *after* the auction, it could not have played any role in helping small businesses to obtain licenses. It is equally clear that adoption of the RBC by the Commission will not further any Congressional goal.

In Omnipoint, the Court described three alternatives available to the Commission after Adarand. Similarly, after Adarand, the Commission had three alternatives available to it to remedy the unconstitutional discrimination that occurred at the auction: (1) it could retain the bidding credit and attempt to justify it under Adarand; (2) it could provide all parties suffering the discrimination

[24] Omnipoint Corp. v. FCC, 78 F. 3d 620 (D.C. Cir. 1996).

with a 25% credit; or (3) it could eliminate the bidding credit.[25] The Commission determined that the first alternative was not feasible.[26] Despite what the Commission is trying to now assert, it also decided against alternative 3, elimination of the bidding credit, due to the Commission's concern to avoid a negative impact on minority- and women-owned bidders and concerns about fairness to those parties.[27] Having eliminated alternatives 1 and 3, the Commission was left with alternative 2, providing all parties suffering the unconstitutional discrimination with a 25% credit. Wanting to avoid refunding tens of millions of dollars to narrowband PCS non-small businesses (an issue discussed *infra.*), the Commission is now trying to compare apples to oranges by arguing that a conversion to a small business bidding credit *after* the auction will have the same effect as its actions taken prior to the Block C PCS auction.

Disingenuously, the Commission further supports the RBC by arguing that "[t]he fact that the pool of licensees eligible for the credit includes all the licensees that had previously been afforded the minority- and women-owned bidding credit is immaterial to the lawfulness of our approach."[28] However, the Commission's previous statements with respect to the RBC belie this argument. In the 218-219 MHz Order released in September 1999, the Commission, in the same sentence, eliminated the minority- and women-owned business bidding credit and *simultaneously* granted

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[25] See Id.

[26] 218-219 MHz Order at ¶60.

[27] Id. at ¶61-63.

[28] Second Recon. Order at ¶47.

credits of the same size to all winning small business bidders.[29] The Commission could not even wait for the next sentence in its Order to reassure the minority- and women-owned bidders that they would not be forced to repay their unconstitutional bidding credit. The Commission, in adopting this two-step remedy, pointed out that no action on the part of minority- and women-owned winning bidders was necessary and that there was no known negative impact on minority- and women-owned winning bidders since all of these bidders were also small businesses.[30] It is evident that the Commission elected this remedy precisely because the remedy would not negatively impacting minority- and women-owned bidders.

The Commission's intent to avoid a negative impact on minority- and women-owned bidders is further evidenced by its failure to pay interest on refunds of the RBC. Some parties (minority- and women-owned bidders) received the benefit of their RBC in 1995. Other parties (the non- minority- and women-owned bidders) will not receive their RBC until 2001 (at the earliest). Yet this latter group will not be compensated for the 6+ year difference in receipt of the RBC.

It is clear from the Commission's statements in the 218-219 MHz Order adopting the RBC that its actions are designed both to continue preferential treatment for minority- and women-owned bidders with respect to another group (non-small businesses) and to deprive non-small businesses of a remedy for violation of their constitutional rights. A constitutional remedy is not sufficient if it only provides a remedy for some of the parties suffering injury. Contrary to what the Commission apparently believes, the Constitution protects everybody, including both small and non-small businesses. As shown herein, the varying treatment of the different groups involved in this

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[29] 218-219 MHz Order at ¶60.

[30] 218-219 MHz Order at ¶61.

proceeding (minority- and women-owned bidders, small business bidders and non-small-business bidders) is so unrelated to the achievement of any combination of legitimate purposes that the Commission's actions are clearly irrational and fail the rational basis review standard cited by the Commission in the Second Recon. Order. Accordingly, adoption of the RBC only with respect to small businesses must be reversed.[31]

V. Price Inflation Caused By The Minority- And Women-Owned Bidders Is Not "Wholly Speculative"

In the Second Recon. Order, the Commission denied the Petition for Reconsideration ("Petition") filed by Kingdon Hughes.[32] Hughes argued in his Petition that the existence of the unconstitutional bidding credits inflated the prices paid by other bidders at the auction. Thus, the Commission's remedy to the constitutional violation is inequitable.[33] Without consideration, the Commission dismissed this argument as "wholly speculative."[34] This curt dismissal ignores two important points. First, evidence of the amount bid in the 1994 auction, which supports Hughes' argument, is a matter of Commission record. In the 1994 auction, if a minority- or women-owned bidder was the high bidder in a market and a non- minority- or women-owned bidder was the second high bidder in the same market, then the minority- or women-owned bidder was awarded one license

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[31] We also note that the Commission has never denied the assertion made against it that adoption of the RBC was motivated, at least in part, to avoid providing a refund to narrowband PCS non-small businesses.

[32] Second Recon. Order, at ¶48.

[33] Id. at ¶43.

[34] Id. at ¶48.

for a price which was 75% of its gross high bid. The non- minority- or women-owned bidder was awarded the second license for the gross amount of its last bid (the second highest bid for the licenses in that market). It is evident from reviewing the auction results that in many instances the price bid at the auction by the non- minority- or women-owned bidder is approximately the same as the gross high bid of the minority- or women-owned bidder (before application of the 25% bidding credit).[35] One example of this is the Allentown-Bethlehem-Easton, PA-NJ market. The minority- or women-owned bidder had the high gross bid of $275,000. After applying the 25% bidding credit, that winning bidder had a net bid of $206,250. The non- minority- or women-owned bidder who had the second high bid ($250,000) was Hughes. Using the bidding credit, the non- minority- or women-owned bidder drove up the price bid at the auction by Hughes to $250,000, which was $43,750 higher than the real amount bid by the minority- or women-owned bidder.[36] Another example involves the Indianapolis, Indiana market. The minority- or women-owned bidder's net high bid was $1,350,000, while the non- minority- or women-owned bidder, WBNS TV, Inc.'s second high bid was $350,000 higher.[37] The Commission's own records contain numerous other examples. However, providing these examples to the Commission apparently would have been futile, since the Commission would still have declined relief even if Hughes had pointed out these examples[38]

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[35] The auction results are available on the Commission's website.

[36] Id.

[37] Id.

[38] Second Recon. Order at ¶48.

The Commission's own belief that business plans were crafted in reliance on the credit is further evidence that it was a factor in the amount bid.[39] Minority- or women-owned bidders used the bidding credit in calculating how high to bid, mindless of the fact that for every $1.00 that a minority- or women-owned bidder added to its bid meant that a non- minority- or women-owned bidder had to add $1.33 to maintain parity with the minority- or women-owned bidder. In essence, every $1.00 of funds that a minority- or women-owned bidder had with which to bid gave it $1.33 in bidding power. Contrary to Commission claim, the power of the bidding credit, and the effect that it had on the bids of non- minority- or women-owned bidders, is quite evident and certainly not "wholly speculative", as asserted by the Commission in the Second Recon. Order.[40]

As a result of the use of the unconstitutional bidding credit by minority- or women-owned bidders, non-small businesses suffered as much as did non- minority- or women-owned small business bidders. Accordingly, non-small businesses bidders are as entitled to a remedy as much as are non- minority- or women-owned small business bidders. The Commission could have simply taken the credit away from the minority- or women-owned bidders and made them pay more (Alternative 3 discussed above). However, the Commission did not want those parties who had crafted business plans in reliance on the credit to lose the benefit of the credit. So, the Commission found a way to give the credit back to them (Alternative 2). This action was motivated by the Commission's desire to enable the minority- or women-owned bidders to retain what was originally given to them by unlawful means.

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[39] Id. at ¶44.

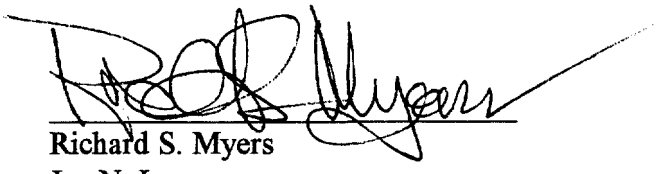
[40] Id. at ¶48.

VI. CONCLUSION

For the forgoing reasons the Commission should grant the petitions filed by the Coalition and Hughes and extend the RBC to all 1993-1995 auction bidders regardless of whether they are small businesses. Otherwise the Commission's "conversion" of the race/gender bidding credit to a credit limited to small businesses preserves unconstitutional discrimination.

Respectfully submitted,

THE AD HOC COALITION:
CELTRONIX TELEMETRY, INC.
TV-ACTIVE, L.L.C.
TEXAS INTERACTIVE NETWORK, INC.
HISPANIC & ASSOCIATES
ZARG CORPORATION
IVDS INTERACTIVE ACQUISITION PARTNERS
G. RAY HALE

By: 

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